Dato' Seri Anwar bin Ibrahim v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 07–2–03 OF 2013(W)
ZULKEFLI CJ (MALAYA), ZALEHA ZAHARI, JEFFREY TAN, ABU SAMAH AND RAMLY ALI FCJJ
26 MARCH 2014

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Civil Procedure — Inherent powers — Federal Court — Inherent power to review own decision under r 137 of the Rules of the Federal Court 1995 — Power to be sparingly exercised — Application under r 137 to expunge part of judgment — Whether injustice occurred — Whether fit and proper case for exercise of inherent powers under r 137

D

Civil Procedure — Judgments and orders — Written judgment — Application to expunge offensive statements in judgment — Test applicable for expunging statements from judgment — Caution against editing judgments

E

Civil Procedure — Jurisdiction of court — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Power to be sparingly exercised — Application under r 137 to expunge part of judgment — Whether injustice occurred — Whether fit and proper case for exercise of inherent powers under r 137

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Constitutional Law — Courts — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Power to be sparingly exercised — Application under r 137 to expunge part of judgment — Whether injustice occurred — Whether fit and proper case for exercise of inherent powers under r 137

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The applicant applied under r 137 of the Rules of the Federal Court 1995 ('RFC') for the Federal Court to exercise its inherent powers to expunge part of one paragraph of the judgment of His Lordship Abdul Hamid Mohamad FCJ (as he then was) in Federal Court Criminal Appeal No 05–6 of 2003(W) and No 05–7 of 2003(W) dated 2 September 2004. The impugned part of the paragraph sought to be expunged states as follows: '… even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we were more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on

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admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else' ('the impugned part'). The impugned part was made in the majority decision of the Federal Court in allowing the applicant's appeal against his conviction and sentence for an offence of committing carnal intercourse against the order of nature. The applicant contended that the impugned part grossly tarnished his reputation as it was constantly repeated as a justification to condemn him as a homosexual.

Held, dismissing the application:

(1) The Federal Court's discretionary powers under r 137 of the RFC should not be exercised liberally but sparingly, in very exceptional cases where a significant injustice had probably occurred. This was not a fit and proper case for the Federal Court to exercise its inherent powers under r 137 of the RFC to make an order for the impugned part to be expunged (see para 9); *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 referred.

(2) The three tests propounded in the case of *State of Uttar Pradesh v Mohd Naim* had been satisfied, justifying the learned judge to make the remarks which the learned judge did in the impugned part. The applicant was a party to the proceedings as an appellant. There was sufficient evidence on record to justify the comment which the learned judge did. The comment was part and parcel of the analytical process undertaken by the learned judge in arriving at the decision which the majority judgment did. It could not be termed a 'personal opinion' of the learned judge who delivered the majority decision (see paras 12–14).

(3) Should this application be allowed, it may open a floodgate for dissatisfied parties to make similar applications to edit judgments of the courts to suit their respective purposes. This would tantamount to interfering with the judicial process which should not be allowed (see para 22).

[Bahasa Malaysia summary

Pemohon memohon di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk Mahkamah Persekutuan menjalankan kuasa inherensnya untuk memotong sebahagian perenggan penghakiman YA Abdul Hamid Mohamad HMP (beliau pada ketika itu) dalam Rayuan Jenayah Mahkamah Persekutuan No 05–6 Tahun 2003(W) dan No 05–7 Tahun 2003(W) bertarikh 2 September 2004. Bahagian perenggan yang dipersoalkan tersebut yang dipohon untuk dipotong menyatakan seperti berikut: '… even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we were more inclined to believe that the

alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else' ('bahagian yang dipersoalkan'). Bahagian yang dipersoalkan tersebut dibuat dalam keputusan majoriti Mahkamah Persekutuan dalam membenarkan rayuan perayu terhadap sabitan dan hukuman untuk kesalahan melakukan persetubuhan luar tabii. Pemohon berhujah bahawa bahagian yang dipersoalkan tersebut mencemarkan reputasinya kerana ia sentiasa diulang sebagai justifikasi untuk mengutuknya sebagai homoseksual.

Diputuskan, menolak permohonan:

(1) Kuasa budi bicara Mahkamah Persekutuan di bawah k 137 KMP tidak patut dilaksanakan secara liberal tetapi berhati-hati, dalam setiap kes luar biasa di mana ketidakadilan yang ketara mungkin berlaku. Ini adalah bukan kes yang layak dan sesuai untuk Mahkamah Persekutuan melaksanakan kuasa inherens di bawah k 137 KMP untuk membuat perintah bagi bahagian yang dipersoalkan untuk dipotong (lihat perenggan 9); *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 dirujuk.

(2) Ketiga-tiga ujian yang dikemukakan di dalam kes *State of Uttar Pradesh v Mohd Naim* telah dipenuhi, menjustifikasikan hakim yang bijaksana untuk membuat kenyataan yang mana hakim yang bijaksana lakukan dalam bahagian yang dipersoalkan tersebut. Pemohon adalah pihak kepada prosiding sebagai perayu. Terdapat keterangan yang mencukupi atas rekod untuk menjustifikasikan komen yang dibuat oleh hakim yang bijaksana. Komen adalah sebahagian proses analisias yang dibuat oleh hakim yang bijaksana dalam mencapai keputusan yang mana dibuat oleh penghakiman majoriti. Ia tidak dapat dikatakan 'personal opinion' hakim yang bijaksana yang menyampaikan keputusan majoriti (lihat perenggan 12–14).

(3) Sekiranya permohonan ini dibenarkan, ia mungkin membuka benteng untuk pihak-pihak yang tidak berpuas hati untuk membuat permohonan yang sama untuk mengedit penghakiman mahkamah untuk menyesuaikan tujuan mereka masing-masing. Ini akan merupakan campur tangan dengan proses kehakiman yang tidak patut dibenarkan (lihat perenggan 22).]

Notes

For a case on Federal Court, see 2(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5477.

A For a case on written judgment, see 2(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5073.

For cases on Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2310–2320.

B **Cases referred to**

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (refd)

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Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (distd)

MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; [2002] 3 CLJ 577, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

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Raja Prithwi Chand Lai Choudhury v Sukhraj Rai and Ors AIR 1941 FC 1, FC (refd)

State of Uttar Pradesh v Mohd Naim AIR 1964 SC 703, SC (distd)

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Taylor & Anor v Lawrence & Anor [2002] 2 All ER 353, CA (refd)

Legislation referred to

Penal Code ss 377A, 377B

F Rules of the Federal Court 1995 r 137

Sulaiman Abdullah (Leela Jesuthasan, Latheefa Koya, Mohd Radzlan bin Jalaludin and Afiq bin Mohd Nor with him) (Abu Bakar & Yong) for the applicant.

G *Manoj Kurup (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Zulkefli CJ (Malaya) (delivering judgment of the court):

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INTRODUCTION

[1] This is an application by the applicant under r 137, Rules of the Federal Court 1995 ('RFC') for this court to exercise its inherent powers to expunge part of one paragraph of the judgment of His Lordship Abdul Hamid Mohamad FCJ (as he then was) in Federal Court Criminal Appeal No 05–6 of 2003(W) and No 05–7 of 2003(W) dated 2 September 2004. The impugned part of the paragraph sought to be expunged states as follows:

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> … even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we were more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else …

[2] The impugned part of the paragraph sought to be expunged is in the majority decision of the Federal Court delivered more than nine years ago in allowing the applicant's appeal against his conviction and sentence for an offence of committing carnal intercourse against the order of nature, an offence under s 377A punishable under s 377B of the Penal Code.

CONTENTION OF THE APPLICANT

[3] The applicant contended that the impugned part of the paragraph had grossly tarnished his reputation and continuously caused serious injustice and damaged his reputation as it had been constantly misused and abused, repeated and widely published as a justification to condemn him as a homosexual or sexual deviant to the public. The applicant was of the view that part of the majority judgment was the personal remark of the learned judge which was not the basis, ratio decidendi nor the obiter dictum of the majority judgment.

[4] The applicant further alleged such a remark was unfair and unreasonable which did not take into account the applicant's evidence in his defence during the trial. According to the applicant there was no evidential basis that justified the making of that remark.

[5] Learned counsel for the applicant submitted that this court has the inherent powers to make any order for the purpose of securing the ends of justice. These powers extend to expunction or ordering expunction of irrelevant remarks made against a person whether or not they were parties to the proceedings. In support of this proposition, learned counsel referred to us the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1 wherein Zaki Tun Azmi PCA (as he then was), cited with approval *Halsbury's Laws of England*, (4th Ed), Vol 37 paras 12 on the issue of 'inherent jurisdiction' at para 37 as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or

equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[6] On the law and the authority relating to expunction of remarks in a written judgment learned counsel for the applicant cited the case of *State of Uttar Pradesh v Mohd Naim* AIR 1964 SC 703 ('Mohd Naim') in which the Supreme Court of India had ordered the expunction of uncalled for remarks made by Mulla J of the Allahabad High Court against the Indian Police Force. In ordering the expunction of the remarks, the Supreme Court observed:

> If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of judges and magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this court. At the same time it is equally necessary that in expressing their opinions, judges and magistrates must be guided by consideration of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider: *(a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself: (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on conduct*. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.
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> *The learned Judge referred to no material on which this observation was based*, nor did he say that his experience of criminal trials gave him an occasion to compare the records of crime of various lawless groups in the State vis-a-vis the Police Force. To characterize the whole Police Force of the State as a lawless group is bad enough; to say that its record of crime is the highest in the State is worse and coming as it does from a Judge of the High Court, is sure to bring the whole administration of law and order into disrepute. *For a sweeping generalisation of such a nature, there must be a sure foundation and the necessity of the case must demand it. We can find neither in the present case*. (Emphasis added.)

[7] It was also submitted for the applicant that our courts had on various occasion expunged remarks made in a judgment. In the case of *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 ('Insas Bhd') His Lordship Eusoff Chin CJ in the Federal Court held that:

> The objectionable and wholly offensive remarks made against a court of law, the plaintiffs and their solicitors, and the learned High Court judge, all of whom had had no opportunity to defend themselves in the face of such unwarranted and unjustified criticisms, ought to be expunged from the judgment of the Court of

> Appeal, as it has a tendency to bring the whole administration of law and order in the courts into disrepute. It is judicially recognized that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

[8] In another local case of *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501, His Lordship Richard Malanjum CJ (Sabah and Sarawak) in the Federal Court at paras 79 and 82 of the judgment held that:

> [79] Having carefully examined the relevance and the context in which the remarks and findings were made particularly in the main judgment of the Court of Appeal we are of the view that they were unnecessary and irrelevant in determining the issues and claims before the court. It is indeed regrettable that those remarks made were not only unnecessary but that the language used was unwarranted to say the least.
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> [82] But as those cases show such criticisms or remarks are not without limit. They 'will carry no weight for the appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material inappropriate.' Hence, in our view what is expected from an adjudicating tribunal is to consider only the evidence adduced to determine if the claims have any merits.

DECISION OF THIS COURT

[9] We would like to state at the outset that we are mindful of the fact that our discretionary powers under r 137 of the RFC should not be exercised liberally but sparingly, in very exceptional cases where a significant injustice had probably occurred. In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* Abdul Hamid Mohamad CJ listed some of the instances where the inherent jurisdiction of this court may be exercised. These are as follows:

(a) where there is a lack of quorum as in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 where two of the presiding judges had retired at the same time when the judgment was delivered and only one judge remaining who was capable of exercising his function as a judge of that court;

(b) where the decision has been obtained by fraud or suppression of material evidence as in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577;

(c) where there is a clear infringement of statutory law eg where the court has mistakenly applied a repealed law. But where it is a matter of interpretation or application of the law, it is not a suitable case for review;

(d) where the application for review has not been heard by the court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lai Choudhury v Sukhraj Rai and Ors* AIR 1941 FC 1; and

(e) where bias has been established as in *Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353.

[10] Having considered the arguments advanced by learned counsel for the applicant and the reply by learned deputy public prosecutor, it is our considered view this is not a fit and proper case for this court to exercise its inherent powers under r 137 of RFC to make an order for the impugned part of the paragraph to be expunged for the following reasons.

[11] It is noted that both the applicant and deputy public prosecutor relied on the three considerations or tests propounded in the case of *Mohd Naim* in support their respective arguments namely:

(a) whether the party whose conduct was the subject of remark was before the court and had the opportunity of explaining or defending himself;

(b) whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on conduct.

[12] Based on the above three considerations or tests propounded in the case of *Mohd Naim* and applying them in the context of the present case we agree with the submissions of learned deputy public prosecutor that the three tests had been satisfied justifying the learned judge to make the remarks which the learned judge did in the impugned paragraph.

[13] We are of the view that both, *Mohd Naim* and *Insas Bhd*, relied by the applicant to support his case can be distinguished on the facts from the present case. In *Mohd Naim* and *Insas Bhd*, comments and opinions deemed disparaging were directed at entities who were not parties to the proceedings and who had no opportunity to explain or defend themselves against those comments. In addition, those comments and opinions were not necessary for

the decision of the case. Thus, in both cases, the offending parts of the judgments were expunged. The situation in the present application is entirely different. The applicant was a party to the proceedings as an appellant. There was sufficient evidence on record to justify the comment which the learned judge did. We agree with submissions of learned deputy public prosecutor that the comment was part and parcel of the analytical process undertaken by the learned judge in arriving at the decision which the majority judgment did.

[14] We observe that the impugned paragraph commenced with the words '… even though reading the appeal record …' were followed by these critical words, 'we find evidence …' In our view the conclusion arrived at by the majority judgment in the impugned paragraph was in fact based on evidence found in the appeal record. It therefore cannot be termed a 'personal opinion' of the learned judge who delivered the majority decision. The appeal record contained the full transcript of what transpired at the trial. Indeed the learned judge alluded to the completeness of the record as follows:

> We must record our appreciation for the meticulous recording of the notes of evidence by the learned trial judge, without which we would not be able to scrutinsze the evidence, the submissions and the grounds for every ruling and decision that he had made in the preparation of this judgment.

[15] We also note that the applicant had testified on his own behalf during the trial before the High Court and in addition had called several witnesses to testify for the defence. The applicant had every opportunity of challenging the accusations made against him, both, by cross-examining the prosecution witnesses, by adducing evidence on his own behalf as well as through his own witnesses. The learned judge of the Federal Court in the majority judgment dealt with the evidence, the submissions and every ruling of the trial judge were scrutinised, and it follows, including the applicant's defence or explanation. It is our judgment that the first test under *Mohd Naim* had been satisfied in the circumstances of this case.

[16] With regard the second test under *Mohd Naim* it may be appropriate to identify the ratio decidendi of the decision of this court given on 2 September 2004 in allowing the applicant's appeal. Upon analysis of the majority judgment, it is clear that the majority decision was based almost wholly on the fact that the date of the offence had not been proven. The majority view was of the opinion that the 'date' formed an essential ingredient of the charge that had to be proved by the prosecution. The majority decision was of the view that even if the evidence of the complainant were corroborated, that would not prove the 'date' of the offence. The majority was of the opinion that since no other date was proved through the complainant, the prosecution had to prove the date as in the charge. This is what the learned judge stated:

In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date.

[17] It is noted that at no time did the majority judgment hold that the sexual offence did not occur. Several passages in the written judgment in dealing with evidence of the complainant amongst others are reproduced herein as follows:

(1) We accept that he may not be lying. He may be confused. May be he cannot remember because the incident happened many years earlier and unlike in most sexual cases, he did not lodge a police report immediately.

(2) We do not go so far as to say that Azizan's evidence is 'uninspiring and unacceptable' or that all his evidence is not credible. All that we say is that some parts of this evidence are rather doubtful or are inconsistent. So, we would still look for corroborative evidence.

(3) No doubt Azizan has been consistent in admitting the incident at Tivoli Villa despite the shame that would have been caused to him by such admission though made years later, but we are doubtful as to when it happened and his purported role as the innocent victim therein.

[18] In highlighting the above passages, we are of the view that the majority judgment accepted that the sexual incident forming the crux of the charge did in fact occur but were doubtful as to when it in fact took place. There was more than sufficient evidence on record for the learned judge to make the observation which he did in the impugned part of the paragraph. It must be stated here that there was a dissenting judgment which had dismissed the appeals. We are therefore of the view that the second test under *Mohd Naim* has also been satisfied.

[19] On the third test as to whether it was necessary for the decision of the case to include the impugned part of the paragraph as an integral part of the majority judgment, we have to address the charge framed against the applicant. In order to prove the charge of committing carnal intercourse against the order of nature under s 377A of the Penal Code, the prosecution had to establish the following ingredients:

(a) that the accused had carnal intercourse with a person;

(b) that such intercourse was against the order of nature;

(c) that the accused did the act voluntarily; and

(d) that there was penetration.

[20] The majority judgment of the Federal Court held that in addition to the above ingredients included the ingredient of 'date'. The applicant was convicted before the trial judge and his appeal against that decision was dismissed by the Court of Appeal. His appeal to this court in 2004 was against that finding that he committed carnal intercourse against the order of nature; that was an ingredient held proved by the trial and intermediate appellate court.

[21] It is settled law that should one of the ingredients of the charge remains unproved, then the charge is not made out. The learned judge in the majority judgment was referring to an ingredient of the charge. We are of the view that there was nothing wrong with that finding. In the extensive analytical process carried out by the learned judge, he mentioned one ingredient of the charge. Submissions were made on that ingredient by both parties to the appeal and that surely entitled the learned judge in delivering the majority decision to comment on that ingredient. We are of the view the third test under *Mohd Naim* has also been satisfied.

[22] It is our judgment that the learned judge in delivering the majority decision was perfectly entitled to make the remark as in the impugned part of the paragraph in accordance with the test propounded in *Mohd Naim*. We are in agreement with the submissions of learned deputy public prosecutor that should this application be allowed, it may open a floodgate for dissatisfied parties to make similar applications to 'edit' judgments of the courts to suit their respective purposes. In our considered view this would tantamount to interfering with the judicial process which should not be allowed.

[23] For the reasons abovestated we dismiss this application.

Application dismissed.

Reported by Kanesh Sundrum